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No. 01-1289

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner,

v.

CURTIS B. CAMPBELL AND INEZ PREECE CAMPBELL,
Respondents.

On Writ of Certiorari to the Utah Supreme Court

BRIEF OF DEKALB GENETICS CORPORATION AS AMICUS CURIAE SUPPORTING PETITIONER

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BRIEF OF
DEKALB GENETICS CORPORATION

INTEREST OF *AMICUS*

Like the petitioner in this case, DeKalb Genetics Corporation recently was subjected to an enormous award of punitive damages, which was affirmed on appeal.[1] *See Rhône-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 272 F.3d 1335 (Fed. Cir. 2001), *petition for cert. filed sub nom. DeKalb Genetics Corp.* v. *Bayer CropScience, S.A.*, No. 02-130 (July 24, 2002) ("*DeKalb*"). In DeKalb's case, a federal

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief. Both petitioner and respondents have filed with the Court blanket consents for all briefs *amicus curiae*.

jury sitting in North Carolina assessed punitive damages of $50 million based on a single instance of non-disclosure of commercial information—although the jury assessed only a nominal damages award of one dollar.[2] The Federal Circuit upheld this huge punitive award—larger than any award by North Carolina's courts[3]—even though the court acknowledged that none of the reprehensibility factors identified by this Court in *BMW of North America* v. *Gore*, 517 U.S. 559 (1996) was present in the case, and notwithstanding the existence of a North Carolina statute capping punitive damages at the greater of three times compensatory damages or $250,000. In large part, the Federal Circuit based its affirmance of the punitive damages award on its presumption that the jury may not have credited the testimony of certain defense witnesses—a factor the court acknowledged rendered the independent appellate review required by this Court's decision in *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), "essentially meaningless." 272 F.3d at 1348.

DeKalb has petitioned this Court to review the constitutional rulings that sustained the award in its case. *See* Petition for a Writ of Certiorari, No. 02-130 ("*DeKalb* Pet."). Its petition presents two important questions closely related to those presented in this case: First, whether in applying *Gore*'s "reprehensibility" guidepost courts may rely upon factors that are neither (a) among those identified by this Court in *Gore* nor (b) related to the defendant's underlying conduct; and second, what sources of legal authority courts must consider in determining whether the award is consistent with the treatment of similar conduct under *Gore*'s "compa-

[2] The jury also awarded $15 million in disgorgement of DeKalb's profits—a figure the district court made clear did *not* reflect plaintiff's injury. *See Rhône-Poulenc Agro, S.A.* v. *Monsanto Co.*, No. 1:97CV1138, 2000 U.S. Dist. LEXIS 21330, at *163 (M.D.N.C., Feb. 8, 2000).

[3] *See DeKalb* Pet. 2-3 & n.1.

rability" standard.[4] The questions presented in DeKalb's petition merit plenary review in their own right; they also inform consideration of the issues in this case. In this *amicus* brief, therefore, DeKalb respectfully submits its views about the issues in this case that bear directly on *DeKalb* and provides perspective on the significance of the issues in this case by informing the Court about the Federal Circuit's erroneous resolution of closely related questions.

THE RELATIONSHIP BETWEEN THE PUNITIVE DAMAGES AWARDS IN THIS CASE AND *DEKALB*

In the case presently before the Court, the punitive damages award was based on an insurance company's refusal to settle third-party claims arising from a single automobile accident. In *DeKalb*, the $50 million award was based on a single instance of incomplete disclosure of information in a cooperative undertaking between commercially sophisticated businesses. An appreciation of the Federal Circuit's erroneous legal rulings and their significance here requires a brief recitation of the facts:[5]

1. In 1994 DeKalb purchased from Rhône Poulenc Agro, S.A., the right to exploit on a royalty-free basis certain genetic constructs it hoped to use to create herbicide-resistant corn. Thereafter, DeKalb did successfully develop and market a commercial line of herbicide-resistant corn seeds employing the genetic constructs.

Rhône Poulenc thereafter sued DeKalb, alleging that, by failing to disclose fully the results of a field test DeKalb had conducted under a prior contractual arrangement, DeKalb

[4] DeKalb's petition also presents important issues about the constitutional limits on punitive damages awards not raised in this case. Among others, these include whether, as the Federal Circuit ruled, an equitable award not based on injury to the plaintiff (such as the $15 million award of disgorgement of profits in *DeKalb*) properly may be considered within the definition of "harm to the victim" under *Gore*'s proportionality guidepost. *See* 517 U.S. at 581.

[5] These facts are set forth more fully in DeKalb's petition.

had fraudulently induced Rhône Poulenc to accept the royalty-free purchase agreement. Rhône Poulenc conceded that "no active lie . . . was sent to [it]," *DeKalb* Pet. App. 163a; that at the time it signed the royalty-free agreement it knew that DeKalb was conducting the field tests; and that DeKalb had volunteered at the time that "results . . . have been very encouraging." *Rhône-Poulenc Agro, S.A.* v. *Monsanto Co.*, No. 1:97CV1138, 2000 U.S. Dist. LEXIS 21330, at *11 (M.D.N.C. Feb. 8, 2000). Unlike the case presently before the Court, *DeKalb* involves no claim of any pattern of past misconduct or a vulnerable victim. The district court specifically stated that the underlying fraud count was not established by clear and convincing evidence (the standard required in most jurisdictions, but at the time not in North Carolina), *DeKalb* Pet. App. 159a, and even the Federal Circuit acknowledged that Rhône Poulenc could readily have kept itself informed of the progress of DeKalb's work, 272 F.3d at 1346. Nonetheless, the jury rendered a verdict in favor of Rhône Poulenc, awarding one dollar in nominal damages, $15 million in disgorgement of DeKalb's profits, and $50 million in punitive damages.

2. The district court held that the punitive damages award was not grossly excessive, 2000 U.S. Dist. LEXIS 21330, at *180, and the Federal Circuit affirmed, 272 F.3d 1335.

Like the Utah Supreme Court in the case at bar, the Federal Circuit recognized that under *Gore*, 517 U.S. 559 and *Cooper Industries*, 532 U.S. 424, due process requires that appellate courts assess the excessiveness of a punitive damages award *de novo* by reference to three constitutionally mandated guideposts. With respect to the first guidepost—the reprehensibility of the defendant's conduct—the Federal Circuit acknowledged that "the facts . . . do not demonstrate *any* of the criteria enhancing reprehensibility mentioned in *Gore*." 272 F.3d at 1349 (emphasis added). The court nonetheless sustained the $50 million award based on the possibility that the jury had concluded that DeKalb's trial

witnesses were not credible due to "several rather implausible explanations and assertions" made during their testimony. *Id.* The court acknowledged that its sole reliance on that speculative ground rendered the *de novo* review mandated in *Cooper Industries* "essentially meaningless." *Id.* at 1348.

With respect to *Gore*'s third guidepost—comparabilty with penalties established by law for similar conduct—the Federal Circuit (like the Utah Supreme Court) adopted an unduly narrow view of the sources of relevant legal authority. The Federal Circuit acknowledged that a North Carolina statute capped punitive damages at the greater of three times compensatory damages or $250,000 but declared that statute to be irrelevant because it was enacted after the conduct giving rise to Rhône Poulenc's fraud claim. *Id.* at 1351-52.[6]

SUMMARY OF THE ARGUMENT

The Utah Supreme Court in this case and the Federal Circuit in *DeKalb* committed similar errors in upholding multi-million dollar punitive damages awards.

First, both courts adopted approaches to "reprehensibility" so flexible as to be without substance, rendering that guidepost "essentially meaningless"—as the Federal Circuit candidly admitted. 272 F.3d at 1348. *Gore*, however, articulated a very specific set of factors to govern the reprehensibility analysis, which it called "[p]erhaps the most important" constitutional test of punitive damages. 517 U.S. at 575. The Utah Supreme Court at least paid lip service to those factors before relying on factors nowhere mentioned in

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[6] Applying *Gore*'s second guidepost—the ratio between the punitive damages award and the plaintiff's harm—the Federal Circuit upheld the punitive damages award despite the *50 million*-to-one ratio between the punitive award and the nominal damages award. The court reasoned, incorrectly, that the proper metric for comparison was the $15 million in equitable relief based on unjust enrichment—notwithstanding the district court's explicit finding that that award was "based upon DeKalb's illicit gains—not damage to [Rhône Poulenc] as a result of the fraud." 2000 U.S. Dist. LEXIS 21330, at *163.

Gore. The Federal Circuit, in contrast, explicitly admitted that "the facts . . . do not demonstrate *any* of the criteria enhancing reprehensibility mentioned in *Gore*." 272 F.3d at 1349 (emphasis added). It nonetheless upheld a $50 million punitive damages award based on a criterion of its own invention: the jury's presumed assessment of the credibility of DeKalb's trial witnesses. Witness credibility is not a characteristic of the conduct at issue in the case, and no precedent of this Court identifies witness credibility among the factors relevant in assessing whether tortious conduct was especially reprehensible. Virtually every trial will involve assessments of witness credibility, and thus under the Federal Circuit's approach virtually every case will involve "reprehensible" conduct sufficient to support a large punitive damages award. As the Federal Circuit admitted, its approach renders *Gore*'s reprehensibility guidepost (and *Cooper Industries*' *de novo* standard of review in relation to that guidepost) "essentially meaningless." *Id.* at 1348. This Court should make clear that the factors identified in *Gore* govern the reprehensibility analysis. But even if the *Gore* factors are not exclusive, the Court should clearly hold that reprehensibility must at least be a characteristic of the underlying tortious conduct, not of extraneous subsequent conduct such as witnesses' courtroom demeanor.

Second, both courts took an unduly narrow approach to the sources of authority relevant to *Gore*'s comparability guidepost. In *Gore,* this Court emphasized the principle of substantial deference to legislative judgment. Where an award vastly exceeds the punishments assessed under legislative standards for conduct of the kind at issue, it threatens to affect primary behavior in ways inconsistent with the intent and judgment of the legislature. In conflict with that reasoning, the Utah Supreme Court in this case chose to ignore an entire category of relevant authority—the actual fines imposed by Utah's insurance commissioner under state law. In *DeKalb*, the Federal Circuit committed an even more fundamental error: it refused to consider a state *statute* capping

punitive damages at 1/200th of the award in the case. Contending that "notice," not deference to legislative judgment, was the animating principle of *Gore*'s comparability guidepost, the Federal Circuit held that the statutory cap was constitutionally irrelevant because it was enacted after the tortious conduct had occurred. The Federal Circuit's holding disregards the reasoning of this Court's prior decisions, and it conflicts directly with *Gore*, which considered state statutes enacted after the tortious conduct at issue. These errors make clear the need for this Court to hold unequivocally that the relevant sources of authority for assessing comparability include state statutes, regardless of the date of their enactment, and judicial and administrative applications of state law.

ARGUMENT

I. "Reprehensibility" Must Be Measured Against The Factors Identified In *Gore*, Or At Least Against Factors That (Like Those Identified In *Gore*) Pertain Directly To The Character Of The Tortious Acts At Issue In The Case.

Of the three guideposts that structure a court's determination whether punitive damage awards are "grossly excessive" and therefore unconstitutional, *Gore*, 517 U.S. at 574-75, the first—reprehensibility—is "[p]erhaps the most important." *Id.* at 575. *Gore* specified the factors against which courts must measure the defendant's conduct to ensure that punitive damages flow rationally from the reprehensibility of that conduct and not from arbitrary jury action. Those factors are: (1) whether the harm was physical, as opposed to economic; (2) whether the tortious conduct evinced an indifference to or reckless disregard for the health and safety of others; (3) whether the target of the conduct was financially vulnerable; and (4) whether the conduct involved repeated actions or was merely a single incident. *Id.* at 576-77. Unsurprisingly, given the purpose of these factors, each evaluates the character of the tortious conduct itself.

The Utah Supreme Court proceeded in this case as if the Gore factors were not the exclusive measures of "reprehensibility." Thus, the court looked to State Farm's treatment of parties other than the plaintiffs, such as its employees and other customers, in a variety of transactions that were dissimilar to the conduct at issue (Pet. App. 21a-23a). In *DeKalb,* 272 F.3d at 1349, the Federal Circuit conceded the *complete absence* of the *Gore* factors, and rested its reprehensibility finding on the jury's possibly adverse assessment of the in-court credibility of DeKalb's trial witnesses.[7]

Such unchanneled approaches to *Gore*'s reprehensibility guidepost contradict this Court's precedents and undercut the constitutional function of the factors identified in *Gore.* This Court's decisions do not suggest that lower courts may invent new criteria to sustain a finding of reprehensibility. To the contrary, they make clear that the reprehensibility guidepost is rooted in "the accepted view that some wrongs are more blameworthy than others," *Gore*, 517 U.S. at 575, and require lower courts to focus their analysis on the commonly accepted criteria the Court has identified for differentiating between more and less blameworthy wrongs. In *Gore* itself, this Court measured the tortious conduct against the criteria it set forth, concluded that "none of the aggravating factors associated with particular reprehensible conduct [was] present," *id.* at 576, and reversed a lower court's decision

[7] The Federal Circuit's abdication of independent review under the *Gore* factors creates a conflict with the First and Ninth Circuits, which have reviewed the reprehensibility of the defendant's conduct without deferring to the jury's findings, including the jury's evaluation of the defendant's behavior at trial. *See In re Exxon Valdez*, 270 F.3d 1215, 1239 (9th Cir. 2001); *Zimmerman* v. *Direct Fed. Credit Union*, 262 F.3d 70, 82 (1st Cir. 2001). In fact, in *Exxon Valdez*, 270 F.3d at 1239, the Ninth Circuit found the jury's award of punitive damages excessive where the district court had observed in affirming the award that the jury might have believed that Exxon's management did not show sufficient remorse at trial. *In re Exxon Valdez*, No. A89-095 (HRH), Order No. 267, 1995 WL 527988, at *11 (D. Alaska, Jan. 27, 1995).

upholding a $2 million punitive damages award. Application of the same set of criteria across all cases as a matter of due process offers the prospect of more consistent and less *ad hoc* results. Conversely, permitting courts' reprehensibility analyses to proceed untethered from established criteria would allow courts to stray from the common ground identified in *Gore,* encourage subjective judgments by reviewing courts that would inevitably vary widely from case to case, and thus yield inconsistent and arbitrary results. *See Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18 (1991) (recognizing that "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities"); *cf. Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring in part and concurring in judgment) ("This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."). Because the purpose of *Gore's* guideposts is to ensure consistent standards and consistent application of punitive damages, courts should apply the same straightforward criteria in every case.

The Federal Circuit's decision in *DeKalb* starkly illustrates the dangers of allowing courts to rely on reprehensibility criteria of their own invention, such as a jury's assessment of witness credibility. The Federal Circuit acknowledged that, as in *Gore* itself, the established reprehensibility criteria were completely lacking. Its newly coined factor—the credibility of DeKalb's trial witnesses—is not even a characteristic of the tortious conduct, and bears no necessary relationship to qualities that are commonly thought to make the underlying wrong more or less blameworthy. Adverse credibility determinations do not depend on the nature of the underlying issues at stake. Moreover, virtually any jury trial involves witnesses and, therefore, entails possible jury determinations about witness credibility; and a court of appeals can seldom, if ever, be sure that a jury did *not* base an award on such determinations. Thus, the result of the

Federal Circuit's newly-minted reprehensibility criterion is a rule that would apparently support virtually *any* punitive damages award, and thus renders *Gore*'s reprehensibility guidepost meaningless. *See also TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 473 (1993) (O'Connor, J., dissenting) (criticizing reviewing court's references to defendants as "really mean," not just "really stupid," and noting that "due process does not tolerate such cavalier standards when so much is at stake.").

Moreover, the Federal Circuit's new reprehensibility factor plainly eviscerated the *de novo* review of excessiveness determinations this Court deemed an essential element of due process in *Cooper Industries*. Because credibility assessments are the domain of the jury, and because the jury might have disbelieved DeKalb's witnesses, the Federal Circuit declared in *DeKalb* that the *de novo* review required by *Cooper Industries* was "essentially meaningless" with respect to reprehensibility. 272 F.3d at 1348. The court effectively deferred to the jury's possible finding that DeKalb's witnesses were not credible in certain respects, and held that this possible lack of credibility itself established reprehensibility. *Id* at 1348-49. But *Cooper Industries* mandates *de novo* review of the *entire* excessiveness determination, including the reprehensibility factor. 532 U.S. at 441 ("[O]ur own consideration of *each* of the three *Gore* factors reveals a series of questionable conclusions by the district court that may not survive *de novo* review." (emphasis added)). By the Federal Circuit's own admission, then, the factor the court invented in *DeKalb* will deprive defendants in virtually every case of the meaningful independent review mandated by *Cooper Industries*.

For these reasons, this Court should make clear that the factors set forth in *Gore* are exclusive and leave no room for lower courts to create new, untested factors. But even if *Gore* leaves some room for courts to rely upon reprehensibility factors not set forth in that case, the Court should make clear, at a minimum, that courts may base constitutionally

mandated reprehensibility determinations only on characteristics of the tortious conduct giving rise to the punitive damages award. In an unbroken line of recent decisions, this Court has held that due process requires that punitive damages may be assessed only where the defendant's *tortious conduct* is reprehensible under accepted criteria. *See Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting) ("[P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that *the defendant's misconduct was reprehensible*." (emphasis added)); *TXO*, 509 U.S. at 460 (plurality opinion) ("It is appropriate to consider the magnitude of the *potential harm* that *the defendant's conduct* would have caused to the intended victim . . . as well as the possible harm to other victims that might have resulted if *similar future behavior* were not deterred." (second and third emphases added)); *id.* at 469 (Kennedy, J., concurring) ("[I]t was rational for the jury to place great weight on the evidence of TXO's *deliberate, wrongful conduct* in determining that a substantial award was required . . . ." (emphasis added)); *id.* at 478 (O'Connor, J., dissenting) ("Judicial intervention in cases of excessive awards also has the critical function of ensuring that another ancient and fundamental principle of justice is observed—that the punishment be proportionate *to the offense*." (emphasis added)); *Gore*, 517 U.S. at 575 (describing the reprehensibility guidepost in terms of the "reprehensibility *of the defendant's conduct*." (emphasis added)); *Cooper Industries*, 532 U.S. at 441 (same); *see also Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., dissenting) ("[T]he court should examine the gravity of the defendant's *conduct*." (emphasis added)).[8] The jury's possi-

[8] This unbroken line of precedent, focusing on the relationship between reprehensibility and the defendant's tortious conduct, also finds strong support in the history behind punitive damages awards. *See TXO*, 509 U.S. at 478 & n.3 (O'Connor, J., dissenting) ("[C]ourts historically have required that punitive damages awards bear a reasonable relationship to the actual harm imposed."); *Gertz* v. *Robert Welch, Inc.*, 418 U.S.

ble adverse assessment of a party's witnesses' courtroom demeanor (*DeKalb*), on the one hand, and entirely dissimilar bad conduct engaged in on other occasions with other alleged victims (this case), on the other, plainly are not factors related to the reprehensibility of the wrong at issue in the case. The Court should make clear that such factors cannot support a finding of "reprehensibility."[9]

323, 350 (1974) ("[Punitive damages] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."); *Mass. Bonding & Ins. Co.* v. *United States*, 352 U.S. 128, 133 (1956) ("By definition, punitive damages are based upon the degree of the defendant's culpability."); *Minneapolis & St. Louis Ry. Co.* v. *Beckwith*, 129 U.S. 26, 36 (1889) ("The imposition of punitive or exemplary damages . . . is only one mode of imposing a penalty for the violation of duty . . . ." (emphasis added)); *Day* v. *Woodworth*, 54 U.S. (13 How.) 362, 371 (1852) ("It is a well-established principle of the common law, that in . . . all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence . . . ."); Restatement (Second) of Torts § 908 cmt. b (1979) ("Since the purpose of punitive damages is not compensation for the plaintiff but punishment of the defendant and deterrence, these damages can be awarded only for conduct for which this remedy is appropriate—which is to say, conduct involving some element of outrage similar to that usually found in crime."); 22 Am. Jur. 2d *Damages* § 762 (2002) ("Punitive damages are awarded to punish or deter particularly egregious conduct. . . . [E]xemplary damages may be recovered only in cases where the wrongful conduct is associated with aggravating circumstances."); 25 C.J.S. *Damages* § 123(1) (1966) ("The doctrine of exemplary damages has been said to . . . depend on circumstances manifesting moral turpitude or atrocity in defendant's conduct . . . .").

[9] Related to their flawed reprehensibility analyses, both the Utah Supreme Court and the Federal Circuit also ignored the principle that the punitive damages award must be *proportional* to the *harm* caused by the tortious conduct. *See Cooper Industries*, 532 U.S. at 435. In this case the disproportionality is evident from the 145:1 ratio between the punitive damages award and the compensatory damages award. In *DeKalb* the 50 million-to-one ratio would obviously be "grossly excessive," even if there were a basis to find special blameworthiness in DeKalb's tortious conduct—which there is not. *See Haslip*, 499 U.S. at 23 (declaring 4:1 ratio to be "close to the [constitutional] line"). To escape this conclusion, the

II. "Comparability" Must Be Rooted In Deference To The Judgment Of The Relevant Legislative Body, And Thus Must Take Into Account Statutes And Applications Of Statutes Specifying Or Limiting Punishment For Similar Conduct, Whether Such Statutes Were Enacted Before Or After The Conduct At Issue.

Gore's "comparability" guidepost requires reviewing courts to ensure that the punitive damages award is rational in the light of sanctions that are imposed for similar conduct under the law of the relevant jurisdiction. 517 U.S. at 583. In *Gore,* this Court explained that this inquiry is constitutionally required because "a reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'" 517 U.S. at 583 (quoting *Browning-Ferris*, 492 U.S. at 301 (O'Connor, J., dissenting)).

Both the Utah Supreme Court in this case and the Federal Circuit in *DeKalb* conducted their comparability analyses in ways incompatible with this Court's rulings. The Utah Supreme Court refused to consider the actual practices of Utah's Insurance Commissioner, reasoning that *Gore* obligated it to consider only the Utah statutes themselves. But executive implementation of a statute over time—under the

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Federal Circuit not only relied on a reprehensibility criterion unrelated to DeKalb's tortious conduct, as discussed in text, but also based its proportionality calculation on an award of relief that does not reflect the harm suffered by the plaintiff—namely an award of DeKalb's profits. That approach was flatly wrong. Remedies such as disgorgement of profits (as the district court in *DeKalb* itself recognized) constitute neither actual harm nor potential harm to the defendant. *See* 2000 U.S. Dist. LEXIS 21330, at *163 (noting that the disgorgement of profits was "based upon DeKalb's illicit gains—not damage to [plaintiff] as a result of the fraud."); *DeKalb* Pet. 15-16; *see also Cooper Industries*, 532 U.S. at 441-42 (defendant's gross profits are not a reliable indicator of plaintiff's injury and thus cannot serve as benchmark for proportionality review).

presumably watchful eye of the legislature—sheds substantial light on the level of punishment that a State believes appropriate for a particular type of misconduct. The statute in question vested the Insurance Commissioner with the power to levy fines, and the Utah Supreme Court violated *Gore*'s core principle of deference by failing to honor that delegation of authority.

The Federal Circuit's comparability analysis in *DeKalb* was still more seriously defective. That court declined to consider a pertinent state *statute*—the purest expression of legislative judgment entitled to deference under *Gore*. The statute caps punitive damages at the greater of three times compensatory damages or $250,000, yet the Federal Circuit decided to ignore it entirely because the tortious conduct (but not the litigation) preceded enactment of the statutory cap. Nothing in *Gore* or *Cooper Industries* suggests that a statute's relevance to *Gore*'s comparability guidepost depends on the date of its enactment. To the contrary, *Gore* considered and repeatedly cited after-enacted statutes in its constitutional analysis, 517 U.S. at 569 n.13, 578 n.28, 584 n.40—an aspect of *Gore* the Federal Circuit explicitly acknowledged, 272 F.3d at 1352, but then inexplicably ignored.

Further, the Federal Circuit's *rationale* for disregarding the statutory cap was inconsistent with *Gore*'s reasoning, and threatens to lead that court even further astray in the future. The Federal Circuit argued that an after-enacted statute is irrelevant because it cannot give notice of possible punishment to a wrongdoer prior to the wrongful act. 272 F.3d at 1352. Even on its own terms, that reasoning is perverse: if anything, lack of notice to the wrongdoer would be a reason for *limiting* a huge punitive damages award, not for leaving it wholly unconstrained. But in any event this Court considered after-enacted statutes in *Gore* because, contrary to the Federal Circuit's expressed rationale in *DeKalb*, deference to the legislature—not notice—is the root principle of the comparability guidepost. Particular punishments established by law presumably reflect the State's judgment concerning the

appropriate level of deterrence and retribution. Ignoring those limits risks overdeterrence relative to the level deemed desirable by the policy-defining state institutions. The imperative of respect for policy judgments by the state legislature exists whether a statute embodying such a judgment was enacted before or after the conduct at issue. *Cf. Gore*, 517 U.S. at 583.

By failing to give effect to North Carolina's punitive damages cap, the Federal Circuit's decision conflicts squarely with *Gore*'s treatment of after-enacted statutes, and with the principle of substantial deference to legislative judgment that animates *Gore*'s comparability guidepost.[10]

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[10] The errors in the Federal Circuit's decision are especially egregious because they undermine core principles of federalism. "States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Gore*, 517 U.S. at 568.

CONCLUSION

Plenary consideration of *DeKalb* would enable the Court to develop more fully its approach to the reprehensibility and comparability guideposts, and to address an important additional question with respect to the proportionality guidepost—whether equitable remedies not based on the plaintiff's injury (such as disgorgement of a defendant's profits) are a proper metric for evaluating whether the punitive award is proportional to the injury. *See* nn. 4, 6, & 9, *supra.* If the Court chooses not to order full briefing and argument in *DeKalb* it should, at a minimum, hold DeKalb's petition, No. 02-130, pending decision in this case, and then dispose of that petition as appropriate in light of its decision in this case.

Respectfully submitted,

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